Office-Supreme Court, U.S.
FILED
MAR 5 1981
ALEXANDER L. STEVAS,
CLERK

80-1605
No. _____

IN THE
Supreme Court of the United States

OCTOBER TERM, 1980

DOMINIC ANTHONY DE LELLO,
Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

Joseph Milchen
FRANK & MILCHEN
225 Broadway, Suite 1755
San Diego, California 92101
Telephone: (714) 238-1888

Attorneys for Petitioner

INTERIM PRINTING & MAILING COMPANY
1105 WEST MORENA BOULEVARD, SAN DIEGO, CALIFORNIA 92110 — 275-3050

No. _____

IN THE
Supreme Court of the United States

OCTOBER TERM, 1980

DOMINIC ANTHONY DE LELLO,
Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

QUESTIONS PRESENTED

1. Whether police officers exceeded the scope of their lawful search of petitioner's residence for burglary suspects when they interrupted that search to investigate items unincriminating at the time of initial discovery.

2. Whether the prejudicial pre-information delay resulting in the loss to petitioner of a crucial pre-trial defense witness, due to prosecutorial misconduct, required the dismissal of the Information against petitioner by the trial court.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	1
STATEMENT	1
CONSTITUTIONAL PROVISIONS INVOLVED	4
REASONS FOR GRANTING THE WRIT	5
CONCLUSION	6
APPENDICES	7

TABLE OF AUTHORITIES

Page

CASES

Coolidge v. New Hampshire,
403 U.S. 443 (1970) 5

People v. Gray,
484 F.2d 352 (1973) 5

United States v. Marion,
404 U.S. 307 (1972) 6

CONSTITUTION

United States Constitution,
Fourth Amendment 4,5,6
Fifth Amendment 5,6

STATUTES

Federal

Title 28, United States Code, Section 1254(1)..... 1

California

Health and Safety Code,
Section 11350..... 2
Section 11359(A)..... 2
Section 11377(a) 3

Penal Code,
Section 1237..... 3
Section 1237.5(a)..... 3
Section 1538.3(m) 3

The petitioner, Dominic Anthony DeLello, respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeal of the State of California, Fourth Appellate District, Division Two.

OPINION BELOW

The opinion of the Court of Appeal (App. A, *infra*, A1 - A2) affirming petitioner's conviction was filed November 10, 1980. DeLello's Petition for Hearing in the California Supreme Court was denied January 7, 1981. (App. B, *infra* B-1.)

JURISDICTION

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

STATEMENT

At approximately 2:00 p.m. on March 3, 1979, Deputy James Devendorf of the Orange County Sheriff's Department received a radio call and responded to a silent burglar alarm at 24641 La Vida, in Laguna Niguel.

Devendorf and a second deputy, Roberts, arrived almost simultaneously in separate cars, at approximately 2:05 p.m.

Neither observed anyone, so both proceeded around opposite sides of the residence to check the doors and windows. One of the officers entered the open door of the garage and checked for suspects, none were found.

While in the rear of the residence, the officers heard a "thump" which they believed emanated from the inside of the residence. Both officers

entered the residence and conducted a room to room search for burglary suspects.

Devendorf had engaged in training in identification of narcotics at the Sheriff's Academy but he had never had any substance which he believed to be marijuana confirmed by a laboratory or narcotics expert. He never previously made an arrest for marijuana.

While in the house Devendorf observed a plastic bag containing a very small quantity of flakes of brown substance on a dresser, scales with white powder on them, bags of what was alleged to be cutting agent and a package of sandwich bags. He also noted a smell of marijuana from some suitcases which he allegedly did not open. Based on all this information, the officer secured a telephonic search warrant. A search revealed mescaline, cocaine, hashish and marijuana.

On March 19, 1979, a Complaint (No. F-O 2231) was filed in the Municipal Court, South Judicial District, Orange County, charging petitioner, Dominic Anthony DeLello (hereinafter petitioner or DeLello) in Count One with a violation of Health and Safety Code, Section 11350 (possession of cocaine) and in Count Two with a violation of Health and Safety Code, Section 11359(A) (possession of marijuana for sale).

On June 12, the case came on for preliminary examination before the Honorable Archie L. Walters, and petitioner was bound over on both counts.

On June 21, a two-count Information was filed in the Superior Court charging petitioner with the same Health and Safety Code violations.

On July 26, petitioner's Motion for an Order Setting Aside the Information pursuant to Section 995 was conceded by the prosecution and granted by the court.

Subsequently, on August 8, a new Complaint (No. F-O 2358) was filed in the Municipal Court, South Judicial District, Orange County, re-charging petitioner with the same offenses as alleged in the original Complaint dated March 19.

On October 16, the petitioner came on for a second preliminary examination, and was bound over on both counts. On October 25, a three-count information was filed in the Superior Court charging DeLello in Counts One and Two with the same Health and Safety Code violations as contained in the Complaint, and in Count Three with a violation of Health and Safety Code, Section 11377(a) (possession of a dangerous drug).

On January 4, 1980, defendant-petitioner's Motion to Dismiss Information came on for hearing and was denied. On the same date, the People's Motion to Amend the Information to allege a prior conviction was granted.

Defendant-petitioner's Motion to Suppress was heard in part on January 4, and completed on February 8, 1980, when the motion was denied.

On January 19, the Amended Information was filed alleging the petitioner's previous conviction of a felony.

Petitioner entered a plea of guilty to Count One of the Information on February 11, and was sentenced to the state prison for a period of two years.

A certificate of Probable Cause as to the Order Denying Defendant's Motion to Dismiss the Information was executed by the Honorable William Thomson, Judge of the Superior Court and duly filed on February 19.

On February 19, a timely Notice of Appeal was filed pursuant to California Penal Code, Sections 1237, 1237.5(a) and 1538.3(m). On

appeal petitioner argued: that the search of his residence prior to the issuance of the search warrant exceeded the scope of a permissible search under the circumstances; that the factual foundation presented to the judge was insufficient to establish probable cause for the issuance of the warrant; and, prejudicial prosecutorial delay denied the petitioner his right to a speedy trial and to due process of law.

The Court specifically held that:

> "(A) The officers had the right to be where they were and the right to see that which was in plain sight. The only matter seized was the baggie of hashish. There was nothing wrong with this seizure.
>
> (B) The above information when given to the magistrate clearly gave the magistrate grounds to issue the search warrant. Officer Devendorf set forth in detail his narcotics expertise, plus confirmation by other officers of what had been seen. The grounds given were sufficient for the issuance of a search warrant."

On November 24, petitioner filed a Petition for Rehearing with the Court of Appeal, Fourth Appellate District, Division Two. On December 1, that petition was denied.

On December 12, 1980, petitioner filed a Petition for Hearing in the California Supreme Court. On January 7, 1981, the request for hearing was denied.

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provisions outlined below are involved in the instant case.

The Fourth Amendment to the United States Constitution provides for: "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be

violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment to the United States Constitution provides in relevant part: "[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law. . . ."

REASONS FOR GRANTING THE WRIT

In view of the fact that the state court has decided several federal constitutional questions of substance in a way probably not in accord with applicable decisions of this Court, the Supreme Court, must, once again, enunciate the basic principles inherent in the Fourth Amendment's proscription against warrantless searches and seizures and in the Fifth Amendment's guarantee of due process in criminal trials.

In *Coolidge v. New Hampshire*, 403 U.S. 443 (1970), this Court explained the nature and extent of the "plain view" exception to the Fourth Amendment warrant requirement. This Court found, inherent in the "plain view" exception the requirement that it be "immediately apparent to the police that they have [incriminating] evidence before them. . . ." *Id.* at 466. As recognized by the United States Court of Appeals for the Sixth Circuit this requirement necessarily prohibits the investigation of evidence unincriminating at the time, in an effort to discover something incriminating. *People v. Gray*, 484 F.2d 352, 356 (1973). In the instant case, a seizure of evidence was upheld despite the fact that the evidence seized became incriminating only after it was seized and more fully investigated.

With regard to the Fifth Amendment's due process guarantee to a fair trial, this Court has indicated that, under certain circumstances, this clause may well require the *dismissal* of the indictment if the defendant can demonstrate that his right to a fair trial was substantially prejudiced

by *pre-indictment* delay. *United States v. Marion*, 404 U.S. 307, 324 (1972). In this case petitioner suffered substantial prejudice when, because of negligent prosecutorial delay, he lost a crucial pre-trial defense witness, and consequently his ability to adequately protect his Fourth Amendment right to be free from unreasonable government searches.

CONCLUSION

Based upon the foregoing, petitioner submits that the state court's erroneous application of the federal constitutional protections afforded by the Fourth and Fifth Amendments, violated his constitutional rights, and he was wrongfully convicted. Therefore, petitioner respectfully requests that a Writ of Certiorari issue to review the judgment of the California Court of Appeal, Fourth Appellate District, Division Two.

Respectfully submitted,

Joseph Milchen

FRANK & MILCHEN

Attorneys for Petitioner

FEBRUARY, 1981

APPENDICES

COURT OF APPEAL - FOURTH DIST.
FILED
NOV 10 1980
ROBERT L. FORD, Clerk
Deputy Clerk

COURT OF APPEAL, FOURTH DISTRICT

SECOND DIVISION

STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

DOMINIC ANTHONY DeLELLO,

Defendant and Appellant.

4 Crim. 14015
(Sup. Ct. C-42992)

OPINION

APPEAL from the Superior Court of Orange County. William W. Thomson, Judge. Affirmed.

Joseph Milchen, Frank & Milchen, for Defendant and Appellant.

George Deukmejian, Attorney General, and Robert M. Foster, Deputy Attorney General, for Plaintiff and Respondent.

Following an unsuccessful motion under Penal Code § 1538.5, defendant pled guilty to possession of cocaine.

Defendant's first contention is that the officer's search of his house following a burglary alarm was too broad in its scope and that the information furnished to the magistrate for the issuance of a search warrant was insufficient. Neither contention has any validity.

Officers responded to a silent burglar alarm in defendant's home. The house gave indications of having been burglarized so the officers entered and searched for burglars. No issue is made as to the entry.

Officer Devendorf, a trained narcotics investigator, saw a plastic baggie of hashish on a dresser. He also saw scales with white powder on them, bags of a cutting agent and a package of sandwich bags which are frequently used to package narcotics. He also noted a strong smell of marijuana from some suitcases which he did not open. Based on all this information, the officer secured a telephonic search warrant. A search revealed mescaline, cocaine, hashish and marijuana.

(A) The officers had the right to be where they were and the right to see that which was in plain sight. The only matter seized was the baggie of hashish. There was nothing wrong with this seizure.

(B) The above information when given to the magistrate clearly gave the magistrate grounds to issue the search warrant. Officer Devendorf set forth in detail his narcotics expertise, plus confirmation by other officers of what had been seen. The grounds given were sufficient for the issuance of a search warrant.

Defendant's other contention is that his right to a speedy trial was abridged.

However, after a plea of guilty, that issue may not be raised on appeal. (*People v. Lee*, 100 Cal.App. 3d 715.) The reason is clear. If the defendant claims he is significantly denied his ability to defend himself that issue can only be presented by a trial. As the Attorney General points out, even though this issue were to be raised, the issue is directly answered by *Bellizzi v. Superior Court*, 12 Cal. 3d 33, a case that is virtually on all fours with this case.

Judgment affirmed.

/s/ Gardner
P.J.

We concur:

/s/ Tamura
J.

/s/ Morris
J.

.ERK'S OFFICE, SUPREME COUI
4250 STATE BUILDING
SAN FRANCISCO, CALIFORNIA 94102

JAN 7 1961

I have this day filed Order

HEARING DENIED

In re: 4 Crim. *No.* 14015

People

vs.

DeLello

Respectfully,

Clerk

os/